PIcArbs

Don't litigate, Arbitrate.

dated 7 March 2018

To: Bill Wood QC

The Civil Justice Council

Via Grahame Hutchins by email: Graham.Hutchens@judiciary.uk

Dear Bill

Re: ADR Report

Further to the submissions we made in December and the meeting yesterday may I make the following observations for your working party to consider.

I restrict my views to personal injury and clinical negligence litigation a field in which I am experienced.

To achieve the objective of encouraging claimants and insurers/the NHSR to use ADR, by which I mean to arbitrate or mediate their claims or to use neutral evaluation, I suggest that a carrot and stick approach is needed in the Pre-action Protocols and the CPR.

The carrot we suggest is the abolition of VAT on legal fees and arbitrators and mediators fees for the work of engaging in ADR after signing an ADR agreement. This will drive paying parties towards ADR instead of litigation. Your committee of course has no power to impose such a suggestion on the Treasury, but you can propose it to the MoJ and the Treasury. Insurers and the Department of Health will like the proposal for it will save them money and drive behaviour towards ADR.

The stick we suggest is to impose a 20% reduction on budgeted or assessed legal fees for the winning party who has refused to engage in ADR of the issues of liability and quantum in the claim.

The Pre-action protocols in personal injury and clinical negligence should state clearly that ADR is not only encouraged, the parties are expected to engage in ADR before or instead of litigation.

I have thought carefully about the suggestion made at the meeting of automatic referral to mediation of all personal injury and clinical negligence claims after issue. I partially support the suggestion on the following basis:

1. Automatic stay should take place 14 days after the service of the defence in all cases where one or both parties have refused to enter an agreement to mediate or arbitrate liability or to obtain a neutral evaluation thereof by that date.

2. The pleadings should be required to state whether the party has offered ADR and when and in what form (CPR rs 7 and 15 to be amended) and what the opponents reply was.

3. Automatic listing of a 30 minute hearing for consideration of an ADR order should then take place before any CMC.

4. If liability is resolved, in relation to quantum in personal injury and clinical negligence claims the referral to ADR order should be discretionary, not "presumed".

A new CPR Rule

So I suggest that there should be a new CPR rule 3A called ADR. It should contain the following:

a. Principle: A firm principle enshrined in the Rule that the courts encourage all parties in personal injury and clinical negligence claims to use ADR instead of the litigation to save the public funds and court services involved in case managing such claims.
b. ADR means:
    i. to enter an agreement to mediate the issues (non binding);
    ii. to enter an agreement to arbitrate the issues (binding);
    iii. to enter an agreement to obtain a neutral evaluation of the issues (non binding);
    iv. to enter an agreement to mediate and then if that fails arbitrate the issues (Med-Arb, binding).
c. Exceptions to the principle:
    It is only in cases where one party or the other with good reason seeks the following that ADR will not be ordered:
    i. That the case should be heard in public because it concerns a point of public interest;
    ii. That there are issues of law which need to be determined by the Courts to change, clarify or advance the law.

d. Stay:
Automatic stay should take place 14 days after the service of the defence in all cases where one party has or both parties have refused to enter an agreement to use ADR by that date.

e. The pleadings:
Should require parties to state whether the party has offered ADR, when and in what form (CPR rs 7 and 15 to be amended) and whether the opponent accepted the offer or rejected it.

f. Automatic ADR hearing listing:
A 30 minute hearing for consideration of an ADR order should be listed (within 3 months maximum) of the service of the defence with a presumption that an ADR order will be granted.

g. Discretion to order ADR:
For liability there should be a presumption that ADR will be ordered. If liability is resolved, in relation to quantum in personal injury and clinical negligence claims the timing of the ADR order should be dependent mainly on the prognosis.

h. Costs penalties:
A failure or refusal to engage in ADR does not lead to striking out or debarring orders on the defaulter. Those could be a breach of a party's right to a fair trial. Instead it leads to two fixed penalty:

(1) a 20% reduction in the budgeted or assessed fees of the defaulter who refused to engage in ADR should that party win a costs award.

(2) indemnity costs for the non defaulter and a 10% increase in any damages to him/her.

Yours truly

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